Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-922

GEORGE E. GOULD,

Petitioner

v.

PATRICIA A. GAVETT, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

George E. Gould
13406 Arctic Ave.
Rockville,Md.,20853
Tel. 949-4955
Petitioner,Pro Se

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In The
Supreme Court of the United States

October Term, 1979

No.

GEORGE E. GOULD, Petitioner
v.
PATRICIA A. GAVETT, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

George E. Gould, your Petitioner,Pro Se, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on Feb. 6,1979.

OPINIONS BELOW

On Feb.6,1979, the United States Court of Appeals for the Fourth Circuit, affirmed the dismissal of Gould's §1985(3) claim. It also dismissed Gould's §§ 1983 claim and pendant claims of slander,libel,defamation.

On July 30,1979,the Fourth Circuit denied Gould's petition for rehearing and suggestion for rehearing en banc.

The United States District Court for Maryland,Murray,J.,issued the following Orders and Memorandums in HM74-1199, March 24,1975;July 31,1975;April 2,1976; May 7,1976;March 18,1977;March 25,1977.

Appendix A contains the United States Court of Appeals for the Fourth Circuit, Judgment of Feb.6,1979, and Order denying rehearing petition,July 30,1979.

Appendix B, is set aside for the District Court's Orders and Memorandums, which are lost,misplaced or mysteriously disappeared.

JURISDICTION

This Court's Jurisdiction is invoked to review Judgment affirming the United States District Court Orders,in the United States Court of Appeals for the Fourth Circuit #77-2143,Feb.6,1979 under 28 U.S.C. 1254(1);Rule 19(Ib) of this Court's rules; 28 U.S.C.§§ 1343; 42 U.S.C.§§ 1981;§1983; §§ 1985(3)§§ 1988.

A Petition for Rehearing and Suggestion for Rehearing en banc, was denied July

30,1979. Petitioner filed for an extension of time to file his Petition for Writ of Certiorari on Oct.29,1979. On Nov.8, 1979,Mr. Chief Justice Burger, granted an extension of time until Dec.12,1979 to file this Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Where there exists a conflict between the U.S.Court of Appeals for the Fourth Circuit,which refuses to extend the equal protection clausein 42 U.S.C.§1985(3), beyond racial discrimination into distinctive classes of political write-in candidates for local state office, and the Seventh Circuit in Florry v. FCC 528 F2d 124, 1974, and in the Sixth Circuit in **Cameron v.** Brock,473 F2d 608,610 (1973) which holds that §§ 1985(3) reaches clearly defined classes, such as supporters of a political candidate.

2. Does a write-in candidate for local State Office enjoy the protection of the 7 th Amendment to a jury trial to determine the facts behind respondent's answers to Petitioner's interrogatories, inquiring into the editorial processes of those re-

sponsible for the publication and public utterances, where the inquiry at trial will produce evidence material to the proof of a critical element of State Action in the Petitioner's cause of action.

CONSTITUTIONAL PROVISION, STATUES AND FEDERAL RULE INVOLVED

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of common law."

The Fourteenth Amendment to the United States Constitution provides in part:

> ".....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any per on of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Article of the Maryland Constitution, titled "Elective Franchise", Sec.5 "Registration of voters." "Opportunity must be given to write-in names on ballot. A voter has the rightunder this section to vote for whom he pleases, and reasonable opportunity must be given him to write or insert in the ballot the names of his choice." Jackson v. Norris 173 Md. 579, 195A. 576 (1938).

The Registration and Election Laws, as amended, 1978, for Maryland Art. 33, §4A-1 Certificate of Candidacy. Requirements of persons seeking nomination; listing and use of names, nicknames, titles, etc. d) Write-in candidates shall file certificates of candidacy as provided in § 4D-1.

§4A-6 Fees- Filing fees, (h) Write-in Candidates. A write-in candidate, as determined under §4D-1 of this art., is required to pay a filing fee equal to that required of a candidate for nomination to the same office sought by the write-in candidate or to the office to which he is

promoted.(ch.399;ch.723,§§2,1975; 1977, ch.638§4)

Write-in Candidates, § 4D-1. Write-in campaigns.(a),(b),(c) (p.62)(Appendix-10)

§16-4 Ballots and ballot labels-In General.(a) Names of candidates and description of constitutional amendments,etc. -Each board shall provide ballots for every election in which any voter in the county or city shall participate, which shall contain: (1) The name of every candidate who has filed or has been nominated in accordance with the provisions of this article;...." (d) List of candidates to be furnished on demand.--A correct list of the names of the candidates for the designated offices shall be furnished on demand by the boards to the candidates or their authorized agents. (p.106)

Electronically Tabulated Punchcard Ballots

§§16A-1 Punchcard ballot voting system in Montgomery County. (pps.121,122)
(d) Rules and regulations.-(6) The casting and counting of write-in votes, if this method of voting is permitted by law.

§§ 16B-3. Notice to local Boards. The State Board shall notify the local Boards

of each system under review and each system approved,certified, or decertified.(1978, chap.347)

§§16B-4 Adoption of Rules and Regulations. The State Board, in exercising its authority under this subtitle, shall adopt rules and regulations governing the procedures for its review,approval, certification, and decertification of voting systems.(1978,ch.347) (p.124)

§§ 25-3,Instructions of Attorney General. It shall be the duty of the Attorney General to prepare instructions necessary for the officers of registration and of election created by this article.(1957,ch. 739,§§1;1967, ch.392,§§1; 1974,ch.197)(p.156)
INSTRUCTIONS OF THE ATTORNEY GENERAL
Instructions to Voters (p.21)

Before a voter enters the voting machine booth,the judges shall instruct him regarding the operation of the machine. This instruction shall be by means of diagrams and by permitting the voter an opportunity to operate a model machine (Sec.16-12)

GENERAL WRITE -IN INSTRUCTIONS (p.22)
Judges are not to volunteer information on write-in voting until asked by the voter.

SECTION II Instructions on use of Shoup Machines. (pps.36,37,38), (9) Remove and Display Model. (10) Post the Specimen Ballots. DURING THE VOTING (12) Instruct each Voter on the Model and Call His Attention to the Specimen Ballot.

AT GENERAL ELECTIONS

A. "Write-in Votes.

"It is suggested that unless the voter asks for information about "write-in" votes, it should not be volunteered; unnecessary details may confuse him."

STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals in its decision,dated Feb 6,1979,p.7,held:

> "This Court also has never held that §§ 1985(3) reaches beyond racial discrimination. See Rodgers v. Tolson, 582 F2d315 (4th cir.1978) Hughes v. Ranger Fuel Corp. 467 F2d 6 (4th cir. 1976)"

In the Rogers v. Tolson p.317 the 4th cir. points out,"The Rogers note, however that other Courts of Appeal have extended §§1985(3) beyond action that was animated by racial discrimination.

They rely on Cameron v. Brock 473F2d 608,610(6th cir.1973),which holds that §§1985(3) "reaches clearly defined classes, such as supporters of a political candidate." Accord Means v. Wilson,522 F2d833(8th cir.1975); Glasson v. City of Louisville,518F2d 899,912(6th cir.1975)

The 4th circuit failed to identy the March 24,1975 Oral Opinion of the District Court, (Murray,J.)

> "Taking his well-pleaded allegations as true, the Court takes note of an alleged on-going trend of conduct by the various organizational groups to deprive Plaintiff of his constitutional right in this case to equal protection."
>
> "Such conduct, according to allegation in the complaint, reached its zenith on the evening of October 7 when, after being told that he was recognized as a write-in candidate and that there would be no difficulty in his being able to address the assembly, Plaintiff Gould was denied the opportunity to state his views

either directly by participating in the forum during direct address to the audience,or indirectly when he attempted to accomplish the same during the open question and answer period." (p.5,lines 9-17)

"At that time, according to the complaint, defendants Kirshner and Elias manned the microphones and in an attempt to drownout Plaintiff stated unequivocally that Mr.Gould is not a legitimate candidate, according to the Board of Supervisors of Elections." (p.5, lines 18-22)

"These statements, coupled with the various allegations of concert or rapport between the various organizational groups, is sufficient at this stage of the pleadings, in the Court's view, to demonstrate a claim of invidious, hostile or purposeful discrimination as required in a Section 1983 action." (p.5 lines 23-25,p.6,lines 1-3)

The 4th Circuit further held:p.7,

"Assuming without deciding that write-in candidates constitute a class for purposes of §1985(3), we agree with

the district court that Gould failed to demonstrate any invidious discrimination. A review of the briefs and the record on appeal indicates that the appellees acted in good faith to provide a needed public service."

On p.8 the 4th Circuit held in Gould 's 1983 claim, that Gould had satisfied the first part in asserting that the law of Maryland recognized the essential equality of write-in candidates.

"The second element, commonly reffered to as state action, could only be satisfied if the members of the BSE conspired with other defendants.The district court found that Murdock and Garber made a good faith attempt to fulfill their duties on the BSE and did not discriminate against Gould."

Rule 10 F.R.A.P. "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence..."

Defendant Garber(BSE) in her answers to Plaintiff's Interrogatories, stated, "Both Mrs. Kirshner and I were aware that Mr.Gould considered himself a write-in

candidate--the only question to which a direct and definite answer could be given by the Board of Supervisors of Elections was whether or not his name would be on the General Election Ballot.(paper 37, ques.6(a)).

"The Board of Supervisors of Election candidate, and I so told Mrs.Kirshner."

"B. A call from Patricia Gavett making the same inquiry as Mrs.Kirshner made. I gave the same answer."

Defendant Kirshner,in her answers to Plaintiff's Interrogatories stated:

> "She told me (Mrs.Garber) that the LWV could continue its policy of presenting in the Voters Guide and at candidate meetings only those candidates whose names would appear on the ballot as long as we indicated this on the front of the Guide and announced this at the candidate meetings." (paper 103 , par. 4)

Defendant Gavett's answers(paper 105), to Interrogatories,ques.3(ii), "Exactly what part of the Oct.4th,1974 LWV letter to Gould ,did Defendant Garber advise,write, contribute to or otherwise reflect her opinions, authority as an Elections Administrator with the BdSE?"

> "Mrs. Garber suggested the addition of the words,"and whose names will appear on the ballot", at the end of paragraph two.Otherwise,the letter appears exactly as I wrote it before I called her and read it to her. (LWV to Gould, P.ex.5)
>
> In 3(i) Defendant Gavett stated,"It is League policy to check with an official and expert source when questions of accuracy arise; Mrs.Garber was the obvious official source in this case.

Gavett's LWV letter to Gould(P.ex.5) 2nd and 3rd paragraphs.

> "Our board of directors has discussed your request to print your material in the general election Voters Guide and,after consultation with other informed sources, has decided to give space in the Guide only to those persons who have been certified as candidates under state law and whose names will appear on the ballot. (underscoring added for emphasis)

REASONS FOR GRANTING THE WRIT

From the word "GO", the Attorney General of Maryland,his staff,the State Administrative Board of Election Laws,its Administrator and the local Boards of Supervisors of Elections, have maintained an arbitrary,discriminatory animus against the class of write-in candidates,including this petitioner, in the State of Maryland General Elections during the years 1974, 1976,and 1978.

The instructions of the Attorney General violate this Petitioner's 14th Amendment,of equal protection under law as well as 42 U.S.C.§§ 1983 and § 1985(3),wherein the Attorney General sets a policy of unequal treatment respecting write-in candidates. In the Attorney General's instructions he specifically reemphasizes that election judges should explain and demonstrate the voting machines to every voter to be sure they understand how to use the voting machine to cast their ballots. To use a model machine and let the voter practice on it. But his instructions concerning write-in candidates is discriminatory per se Article 33 §25-3, p.22.

"General Write-in Instructions. Judges are not to volunteer information on write-in voting until asked by the voter." Again on page38 his instructions for election officials, AT GENERAL ELECTIONS, A. Write-in Votes. "it is suggested that unless the voter asks for information about "write-in" votes, it should not be volunteered; unnecessary details may confuse him."

The Attorney General and the State Administrator of the State Administrative Board of Election Laws (of Maryland) have misapprehended the Registration and Election Laws of Maryland regarding equal rights of Write-in candidates under Art. 33 §4A-1 "Certificate of Candidacy"

§4A-6 "Fees,Filing Fees

§4D-1 "Write-in Campaigns,write-in candidates."

§16-4 "Ballots and ballot labels (a)(1),(d)

§16A-1"Punchcard ballot voting system" (d)(6).

§16B-3"Notice to local boards."

§16B-4"Adoption of Rules and Regulations."

As a result of the official instructions of the Attorney General and the

State Administrative Board of Election Laws, together with special election Guidelines prepared by George Nilson, Ass't Attorney General of Maryland for election franchise, there was a steady stream of communication denying write-in candidates equal protection under law as part of official State Action,to local Boards of Supervisors of Elections.

Letter to defendant Garber,Elections Administrator,from Board attorney John P. Diuguid, Oct.1,1974 (Appendix)

"Note: The attached draft memorandum was prepared by Geo.Nilson,Ass't Atty Gen, for the Baltimore City Bd of Elections. (Nilson is not only the staff atty in the AG office with primary responsibility for elections; he is also counsel to the Baltimore City Bd of Elections.).....This memo may be useful to us in coming up with the required answers for George Gould. However our problem is not nearly as large as the Balto City situation. Gould is a single, independent candidate. There probably will be a few write-in votes for him, but I doubt

that he will have organization substantial enough to create a write-in vote of great dimension."

This was an official notice that Gould was an independent candidate because Attorney Diuguid, spoke of meeting with George Nilson and his own employee Dale Saliba and researching Gould's candidacy as a write-in candidate. On Oct.2nd,1974 the Montgomery County Board of Supervisors of Election met and discussed Diuguid's correspondence. This matter was brought to the attention of defendant Murdock,who was President of the Board,the following day. As president of the Board, Murdock wrote Gould his letter of Oct.4,1974. Murdock starts his letter out by reference to"preliminary response from our counsel" regarding questions Gould had raised in making his write-in campaign successful. Murdock's statement "--since your candidacy is continuing--." is not an mere figure of speech.Further correspondence demonstrates that the Board and its President acknowledged Gould's candidacy.

The question therefore, What is behind Garber's advice to the LWV page 12,supra,

"The Board of Supervisors of Election could not make the decision for the League of Women Voters as to whether, in their campaign activity, George Gould should be considered a General Election Candidate, and so told Mrs. Kirshner."

In addition, there is the question of what motivated Garber to advise the LWV that they could cut Gould's candidacy from the General Election Voters Guide with immunity by suggesting the words,"and whose names will appear on the ballot." (p.13,Supra),since over 50,000 copies of the voters guide was distributed through the Montgomery County schools by official permission of the Montgomery County School Board as well as in all the public libraries of Montgomery County.

Gould contends that this case is on all fours withthe recent Herbert v. Lando decision, #77-1105 (slip Opinion),Held,

"...there is no privilege under the First Amendment's guarantees of freedom of speech and freedom of the press barring the plaintiff from inquiring into the editorial processes

of those responsible for the publication where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action."

Petitioner's motion to Vacate Order of Dec.1975 cited Supreme Court decisions, including Super Tire Engineering Co. v. McCorkle,#72-1554(decided April 16,1974), and cases cited therein, Dunn v. Blumstein 405 US 330; Moore v. Ogilvie,394 U.S. 814, 818(1969)

"In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See e.g....Evans v. Cornman 398 U.S.419,421-422 (1970); Framer v. Union Fee School District 395 U.S.621,626-628(1969);..."Dunn v. Blumstein,405 U.S. 330 at 336, again on page 351, it held,

"States may not casually, deprive a class of individuals of the vote because of some remote administrative benefit to the State." Id. at 96.

In Moore v. Ogilvie,394 U.S. 814 at 818 (1968).

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society,and any restrictions on that right strike at the hear of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. 377 U.S. at 555."

Questions Presented.

1. There exists a conflict between the Fourth Circuit which holds in this case that it has never gone beyond "racial discrimination"in 42 USC §1985(3) and the Sixth Circuit in Cameron v. Brock 473 F2d 608,610(1973) and the cases cited supra. Petitioner cited Florry v. FCC 74-2010(slip opinion)(Seventh Cir.1975), (paper 100).

> "The scope of our declaratory relief is that a candidate who has not yet qualified for ballot position under state election laws is nevertheless

> entitled to equal time if he is otherwise eligible under the second prong of §§73-120(a) and 73.657 (a) and commits himself to seeking election by the write-in method in the subsequent election..../We deem it sufficient that we have set forth the guidelines applicable in the future." (slip opinion,p.13)
>
> "In this review procedure, of course, it is not our province to concern ourselves with the practical difficulties that may be occasioned by an unlimited application of the equal time principle so as sweep within its coverage political candidates who by any objective standard would have a de minimus participation in an election. The matter of the scope of the legislation is a policy question for the congress." (slip opinion,p.8)

Petitioner is of the firm belief that the granting of Certiorari will be of immense benefit to write-in candidates and to increasing the elective franchise of the independent voter.

2. The District Court and the Fourth

Circuit misapprehended the Respondents sworn answers to Petitioner's Interrogatories. The District Court had at one time during a Court conference set a tenative date for a trial on the issues.

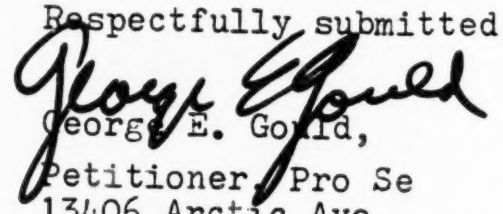
After the respondents had filed their answers, Gould moved for a Summary Judgment based on their admissions of State Action and conspiracy. Supra. The refusal of Garber,BSE, to inform the LWV and Montgomery County PTA's that Gould was a single, independent write-in candidate according to Art.33 §§16-4(1)(d) List of candidates to be furnished on demand-A correct list of the names of the candidates for the designated offices shall be furnished on demand by the boards to the candidates or their authorized agents.(p.106)p.6,supra. also pps,11,12,13 supra.

Petitioner has consistently requested a jury trial to determine the evidence in this action.

CONCLUSION

For the foregoing reaons,the Petitioner submits that the Court erred in not reversing the District Court Judgment. Therefore the Judgment should be reversed.

Respectfully submitted,



George E. Gould,
Petitioner, Pro Se
13406 Arctic Ave.
Rockville,Md. 20853
Tel. 949-4955

EXHIBIT A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2143

George E. Gould,

Appellant,

v.

Patricia A. Gavett, as President of, Janet Kirshner, as 1st Vice President of, League of Women Voters of Montgomery County of Maryland, Inc.; Austin Heyman, as President of, Joan Elias, as 2nd V. President of, Mongtomery County Council of Parent Teacher Associations; Harriet Bernstein, as President of, Dr. Homer Elseroad, as Secretary of, Robert Bourbon, as Attorney for, Montgomery County School Board and James Henry Murdock, as President of, Marie M. Garber, as Elections Administrator, of the Board of Supervisors of Elections for Montgomery County, Maryland;

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert L. Murray, District Judge.

APPENDIX 1-A

Submitted: January 18, 1979. Decided: February 6, 1979

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

(George E. Gould, Appellant Pro Se. John P. Diuguid, Karl W. Pilger [Diuguid, Siegel & Kennelly] on brief for the Appellees.)

PER CURIAM:

George E. Gould appeals from the orders of the District Court for the District of Maryland which dismissed his complaint for alleged violations of his civil rights pursuant to 42 U.S.C. §§ 1983 and 1985, dismissed his claim of defamation, and denied declaratory and injunctive relief as to the constitutionality of certain public school laws and procedures of the State of Maryland. The appellees have moved for a summary affirmance. We grant the motion pursuant to Rule 7(b) of this Court.

I

Gould instituted this suit, pro se, on October 30, 1974. He named nine defendants who were officers in four organizations. Patricia Gavett was named as president of the League of Women Voters of Montgomery County (LWV) and Janet Kirshner was named as vice president. Austin Heyman was named as president of the Montgomery County Council of Parent and Teachers Associations (MCCPTA) and Joan Elias as vice president. The third group of defendants named was Harriet Bernstein, president of the Montgomery County School Board (MCSB), Homer Elseroad, secretary, and Robert Bourbon, attorney. Finally, James Henry Murdock was named as president of the Board of Supervisors of Elections for Montgomery County (BSE)

and Marie Garber as elections administrator. Gould sought three million dollars in damages from these defendants for violation of his civil rights and elective franchise.

Gould's complaint arises from his candidacy for the Montgomery County, Maryland, school board in 1974. Gould was defeated in the primary election held on September 10, 1974, but he continued his campaign as a write-in candidate until his defeat in the general election held on November 5, 1974.

At a pre-primary candidates' forum held on September 4, 1974, Gould stated that the League of Women Voters discriminated against him by failing to give him adequate space in its pre-primary Voters' Guide. Patricia Gavett publicly told him that he was "in error." Gould contends that this statement constituted defamation.

On October 7, 1974, after Gould was defeated in the primary election, the LWV and MCCPTA jointly sponsored a candidates' forum at a local public high school. The purpose of the forum was to provide an opportunity for successful primary candidates to speak. Despite his request, Gould was not permitted to address the audience.

Finally, on October 8, 1974, Gould attempted to speak at a meeting of the MCSB. He was not allowed to speak at that Board meeting.

From these facts, Gould contends that a conspiracy existed among the defendants to deprive him of his right to speak at the October 7th meeting. He sued the LWV and MCCPTA because they jointly sponsored the forum on that date. Because the MCSB was in charge of all public school buildings, Gould contends that Bernstein, Elseroad and Bourbon should not have permitted the use of the high school for the forum because he was denied his rights at the meeting. Finally, he alleges that the BSE conspired to deny him his civil rights by advising the LWV that he was not a candidate for election. Gould maintains that the BSE knew he was a candidate and maliciously told the LWV otherwise. Gould based this claim on the fact that he received a letter on October 4, 1974, from the BSE which contained the words, "since your candidacy is continuing."

On May 29, 1975, Gould moved the district court, in what he termed a "subsidiary action," to declare unconstitutional certain public school laws of the State of Maryland and instructions promulgated by the Attorney General. He also sought a preliminary injunction to restrain the enforcement and execution of these statutes and instructions and requested a three-judge court to consider the issue. The district court denied the motion in an oral opinion on December 19, 1975.

On that same date the district court granted Gavett's motion for partial summary judgment as to the defamation allegation. The district court also granted the motion of Bourbon and Elseroad to dismiss the allegations against them. On May 7, 1976, the district court granted summary judgment motions for Garber, Murdock and Bernstein. Subsequent to these actions, but prior to the final disposition of his complaint, Gould appealed to this Court. We dismissed the appeal as premature in an unpublished opinion (No. 76-1801, Jan. 11, 1977). The Supreme Court denied Gould's petition for certiorari on May 2, 1977. The district court, on March 18, 1977, granted a summary judgment motion for Gavett and Kirshner. On March 25, 1977, the district court granted summary judgment for Heyman and Elias. All pending counterclaims were dismissed on April 27, 1977, thus disposing of this action before the district court.

This case once again comes before us on appeal. Since the district court has rendered a final judgment, it is now within our jurisdiction to address the merits of Gould's claim. 28 U.S.C. § 1291.

II

We affirm the district court's dismissal of the § 1985(3) claim. In Griffin v. Breckinridge, 403 U.S. 88, 102 (1971), the Supreme Court held that one of the elements of a cause of action based on § 1985(3) is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." The Court did not decide whether § 1985(3) embraces conspiracies motivated by non-racial discriminatory intent. 402 U.S. at 102 n.9. This Court also has never held that § 1985(3) reaches beyond racial discrimination. See Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1976).

The district court, liberally construing Gould's claim, held that write-in candidates constitute a class for purposes of § 1985(3). It relied on the decision of Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973), which holds that § 1985(3) "reaches clearly defined classes, such as supporters of a political candidate."

Assuming without deciding that write-in candidates constitute a class for purposes of § 1985(3), we agree with the district court that Gould failed to demonstrate any invidious discrimination. A review of the briefs and the record on appeal indicates that the appellees acted in good faith to provide a needed public service. Therefore, we affirm the judgment, if not the entire reasoning, of the district court.

III

The district court also granted summary judgment for the appellees on Gould's § 1983 claim. There are two essential elements of a § 1983 claim. First, the plaintiff must demonstrate that the defendants deprived him of a right secured by the Constitution and the laws of the United States. Second, the defendants must have acted under color of state law. Adickes v. Kress & Co., 398 U.S. 144, 150 (1970).

The district court found, relying on Snowdon v. Hughes, 321 U.S. 1 (1944), that Gould satisfied the first element by asserting that the law of Maryland recognized the essential equality of successful primary and write-in candidates and that the denial of these rights vis-a-vis write-in candidates constitutes a denial of equal protection under the Fourteenth Amendment. The second element, commonly referred to as state action, could only be satisfied if the members of the BSE conspired with the other defendants. The district court found that Murdock and Garber made a good faith attempt to fulfill their duties on the BSE and did not discriminate against Gould.

A review of the record discloses that the district court's conclusion is not clearly erroneous. Since Gould failed to satisfy the element of state action, a claim pursuant to § 1983 cannot be asserted against any other defendant.

IV

Under its pendent jurisdiction, the district court considered Gould's state claim of slander against Gavett. This claim arose from Gavett's statement that Gould was in error when he publicly stated that the LWV discriminated against him in its pre-primary Voters' Guide.

Under the law of Maryland, which the district court properly applied to this claim, it is for the court to decide whether the words complained of constitute slander. Walker v. D'Alesandro, 212 Md. 163, 129 A.2d 148 (1957). The district court held that Gavett's statement was not slander as a matter of law. We believe that the district court was well within its discretion in reaching this conclusion and therefore affirm the disposition of this claim.

V

In a motion termed a "subsidiary action," Gould challenged the constitutionality of certain public school laws of the State of Maryland and instructions promulgated pursuant to these laws by the state Attorney General. The district court declined to grant declaratory judgment, a preliminary injunction, or to convene a three-judge court as Gould requested. The district court found that a declaratory judgment would in no way advance the underlying civil rights

action and that Gould had not alleged any irreparable future harm to his constitutional rights justifying issuance of a preliminary injunction. Since there was no occasion for the grant of the injunction, the court denied the request for a three-judge court. Citing principles of federalism, the district court remanded Gould to his remedy in state court.

The district court did not abuse its discretion in denying Gould's motion. See Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970); Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321 (4th Cir. 1937). We also note that the district court overlooked procedural defects in Gould's attempt to obtain declaratory and injunctive relief in an effort to liberally safeguard his rights. Therefore, we find no merit to this appeal.

A careful review of the briefs and the record on appeal discloses that this appeal is without merit. Accordingly, we grant the motion for summary affirmance.

AFFIRMED.

J U D G M E N T

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2143

George E. Gould,

Appellant,

vs.

Patricia A. Gavett, as President of Janet Kirshner, as 1st Vice President of, League of Women Voters of Montgomery County of Maryland, Inc.; Austin Heyman, as President of, Joan Elias, as 2nd V. President of, Montgomery County Council of Parent Teacher Associations; Harriet Bernstein, as President of, Dr. Homer Elseroad, as Secretary of, Robert Bourbon, as Attorney for, Montgomery County School Board and James Henry Murdock, as President of, Marie M. Garber, as Elections Administrator, of the Board of Supervisors of Elections for Montgomery COunty, Maryland;

Appellees.

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
FEB 6 1979
WILLIAM K. SLATE, II
CLERK

William K. Slate II
CLERK

FILED

JUL 30 1979

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2143

George E. Gould,

Appellant,

versus

Patricia A. Gavett,

Appellees.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

It is further ordered that the costs of the appeal in favor of the appellees is granted. The attorneys' fees are denied.

Entered at the direction of Judge Russell for a panel consisting of Judge Russell, Judge Field, and Judge Widener.

For the Court,

William K. Slate II
CLERK

12-A

Exhibit 4-B

LAW OFFICES
DIUGUID & SIEGEL
ONE THOUSAND CONNECTICUT AVENUE, N.W.
SUITE 1113
WASHINGTON, D. C. 20036
(202) 872-0700

MARYLAND OFFICE:
3737 BRANCH AVENUE
HILLCREST HEIGHTS, MD. 20031
(301) 423-5778

1 October 1974

Marie M. Garber, Elections Administrator
Supervisors of Elections for Montgomery Co.
Box 333
Rockville, Maryland 20850

Dear Marie:

I have had Dale Saliba research the questions you raised in your memorandum of 20 September, and have discussed his conclusions with him and with George Nilson of the Attorney General's office. Mr. Nilson is in agreement with the conclusions which we have reached. (UNDERSCORING ADDED FOR EMPHASIS)

1(A). Can a defeated primary candidate run as a write-in candidate in the general election?

You are absolutely correct that the statute makes no reference to this specific situation, but by not making any reference, it does not prohibit the practice. The Attorney General's office accepts the practice; and such write-in votes will be counted.

1(B). Can stickers be used for write-in votes?

For the reasons given in the 29 September 1967 memorandum from the Attorney General's office, stickers are not allowed. In addition, from a purely practical standpoint the stickers are viewed as a potential problem, were they used, as they could clog the voting machines.

1(C). What are the guidelines for insuring the validity of votes for write-in candidates?

Ultimately, this question will have to be dealt with on an ad hoc basis by the canvassers. However, as this ques-

Appendix-1B

tion has been raised in Hartford County and Baltimore City, George Nilson has prepared some guidelines (for Baltimore). He is sending a copy of the memorandum to us, and I would suggest that we examine his memorandum before giving final guidelines to the candidates involved, or to the election judges and canvassers.

2. Can an individual who has already contributed $2,500 contribute to the campaign account of a defeated candidate?

The answer to this question is definitely "No". Article 33, §26-9, provides that the maximum amount an individual may contribute to a primary election is $2,500. Because in the case you mention the proposed contribution would be used to help erase the debt incurred in the primary, it is a contribution for the primary, and would therefore be illegal.

I will be in touch with you as soon as I receive the information from George Nilson.

Should you have any further questions, please do not hesitate to contact me.

Sincerely,

John P. Diuguid

JPD:kd

Appendix - 2B

Exhibit 4-C

LAW OFFICES
DIUGUID & SIEGEL
ONE THOUSAND CONNECTICUT AVENUE, N.W.
SUITE 1113
WASHINGTON, D. C. 20036
(202) 872-0700

J. DIUGUID
S. L. SIEGEL
L. SALISA

DC
MD
VA
NY

MARYLAND OFFICE:
8737 BRANCH AVENUE
HILLCREST HEIGHTS, MD. 20031
(301) 423-5778

1 October 1974

Marie M. Garber, Elections Administrator
Supervisors of Elections for Montgomery Co.
Box 333
Rockville, Maryland 20850

Dear Marie:

Enclosed you will find a copy of the memorandum from George Nilson, which I mentioned to you previously. We have reviewed the memo, and have no additions at this time.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

John P. Diuguid

JPD:kd

Enclosure

NOTE: The attached draft memorandum was prepared by Geo Nilson, Asst Atty Gen, for the Baltimore City Bd of Elections. (Nilson is not only the staff atty in the AG office with primary responsibility for elections; he is also counsel to the Baltimore City Bd of Elections.)
The City has a number of large write-in campaigns coming up this year. I sent you a piece from yesterday's Sun on the subject.
This memo may be useful to us in coming up with the required answers for George Gould. However, our problem is not nearly as large as the Balto City situation. Gould is a single, independent candidate. There probably will be a few write-in votes for him, but I doubt that he will have organization substantial enough to create a ~~xxx~~ write-in vote of great dimension. (UNDERSCORING ADDED FOR EMPHASIS)

MGarber 10-7-74

Appendix - 3B

Exhibit 4-D

JAMES HENRY MURDOCK
PRESIDENT
MRS. MARION L. CLARK
W. LEE HAMMER

MRS. MARIE M. GARBER
ELECTIONS ADMINISTRATOR
JOHN C. EISELE
ELECTIONS ADMINISTRATOR
JOHN P. DIUGUID
COUNSEL

BOARD of SUPERVISORS of ELECTIONS

for
MONTGOMERY COUNTY, MARYLAND
POST OFFICE BOX 333
ROCKVILLE, MARYLAND 20850
Telephone 279-1507

October 4, 1974

Mr. George E. Gould
1710 Mark Lane
Rockville MD 20852

Dear Mr. Gould:

We have had a preliminary response from our counsel to the questions you raised regarding write-in votes, and I am herewith conveying to you the information we have at this time.

Stickers are not permitted, in accordance with a ruling of the Attorney General of Maryland dated September 29, 1967.

Questions about guidelines for valid write-in votes are still being considered. Our counsel is expecting further guidance from the Attorney General. Following receipt of such information, we will formulate guidelines and convey them to you.

You ought to be reminded, further, that you will be required -- since your candidacy is continuing -- to continue to comply with the provisions imposed on all candidates by the Fair Elections Practices law related to campaign funding and other matters. (UNDERLINING ADDED FOR EMPHASIS)

Sincerely,

James Henry Murdock, President

Board of Supervisors of Elections
for Montgomery County, Maryland

JHM:dg

Appendix 4B

Exhibit 4-E

JAMES HENRY MURDOCK
PRESIDENT
MRS. MARION L. CLARK
W. LEE HAMMER

MRS. MARIE M. GARBER
ELECTIONS ADMINISTRATOR
JOHN C. EISELE
ELECTIONS ADMINISTRATOR
JOHN P. DIUGUID
COUNSEL

BOARD of SUPERVISORS of ELECTIONS

for
MONTGOMERY COUNTY, MARYLAND
POST OFFICE BOX 333
ROCKVILLE, MARYLAND 20850
Telephone 279-1507

October 18, 1974

Mr. George E. Gould
1710 Mark Lane
Rockville, Maryland 20852

Dear Mr. Gould:

This is in response to your hand-delivered letter of October 16, 1974.

The Board of Supervisors of Elections for Montgomery County, Maryland, met last evening and gave full, careful and deliberate consideration to the questions raised in your letter:

1. The instructions for operating the automatic voting machine on the casting of a write-in vote are being revised so as to make it more understandable to the citizens and voters as to how that vote can be made. The revised instruction sheet will include a graphic presentation, as well as the necessary narrative material.

   You may be assured that, in the training sessions for the election officials, the staff will emphasize the write-in vote procedure so that all poll officials are prepared to serve the electorate as to how write-in votes may be cast. (MARKING ADDED FOR EMPHASIS)

2. It is the opinion of the Board that the law and the opinions of the Attorney General do not require that our office offer two pencils to each voter for the purpose of casting write-in votes. It is our opinion that, if a voter is desirous of casting a ballot by way of write-in vote, he will come to the polls with a pen or pencil. In the event he has neither, he will make inquiry of the election officials for a writing instrument. They will have such available.

Appendix 5B

3. A voter casting a write-in vote for any office or position should write the full name of the person for whom he is voting. The election judges will be directed to so instruct any voter who inquires.

As to the acceptability of write-in votes for George E. Gould for the office of member of the Montgomery County Board of Education, we would first make reference to the qualifications for that office - that one must be "a qualified voter in Montgomery County, Maryland". There is only one George E. Gould on the voters' list, so there would be no question about counting such a write-in. There is furthermore only one G. E. Gould (the full first name is George), so such a write-in would also be counted. George Gould, however, would not be sufficiently specific since there are three persons with the given name of George and surname of Gould on the Montgomery County voter registry.

You will recall that in my last letter to you I made reference to campaign finance reports required of candidates for public and party offices in the State of Maryland. As a candidate for the Board of Education in the September 10, 1974 primary election, you were covered by the requirement to file such a financial report no later than noon of October 10, 1974, being thirty days following the election. To date, no such report has been received by this office from you.

I trust that the above helps clarify your inquiries and that this information will be of assistance to you.

Very truly yours,

President
Board of Supervisors of Elections
for Montgomery County, Maryland

JHM:MMG:dg

Appendix 6B

Mrs. Marion L. Clark
W. Lee Hammer

Exhibit 4-F

ELECTIONS ADMINISTRATOR
John C. Eiselé
ELECTIONS ADMINISTRATOR
John P. Dilgard
COUNSEL

BOARD of SUPERVISORS of ELECTIONS

for
Montgomery County, Maryland
Post Office Box 333
ROCKVILLE, MARYLAND 20850
Telephone 279-1507

October 28, 1974

Mr. George E. Gould
1710 Mark Lane
Rockville MD 20852

Dear Mr. Gould:

This is in reference to one item of our October 18, 1974 letter to you. That item is on page 2 of the letter, the second paragraph of No. 3.

We indicated that in accepting write-in votes for George E. Gould for office of member of the Montgomery County Board of Education, we would accept either "G. E. Gould" or "George E. Gould". We explained our reasons for setting such standards.

Since then, however, we have received further instructions from the State Administrative Board of Election Laws regarding the handling of write-in votes. These instructions have been reviewed and approved by the Attorney General of Maryland.

(UNDERSCORING ADDED FOR EMPHASIS)

In accordance with the recent communication from the State Board, we will accept a write-in vote if it includes only the surname and the initial of the first name -- i.e., "G. Gould" in your instance.

Very truly yours,

James Henry Murdock, President

BOARD OF SUPERVISORS OF ELECTIONS
for Montgomery County, Maryland

CC: Board members, Substitutes, Counsel

Appendix 7B

9. *Remove and Display Model*

One Machine in each polling place has a small working model of a portion of the face of the Machine at the bottom of the paper roll compartment. This is for instruction of voters. Remove this model from the Machine and lock the door. Put No. 4 key on your election officer's key ring.

During the election, the working model should be displayed so that those waiting to vote must see it. Either stand it on the election officer's table or hang it on the wall of the voting room near the specimen ballots. One election officer should be in attendance at the model to explain it to each voter.

10. *Post the Specimen Ballots*

Two or more specimen ballots duplicating the face of the Machine will be furnished each polling place. Post these specimens on the wall where the voters can readily see them and become familiar with the names of the candidates, the question, if any, and their positions on the Machine.

closed. It must be pulled out each time a voter enters the Machine, *in either a general or a primary election.*

DURING THE VOTING

12. *Instruct Each Voter on the Model and Call His Attention to the Specimen Ballot*

Much time will be saved and confusion avoided if each voter understands before he enters the voting booth just how to operate the Machine. Therefore be sure that Instruction 9 is followed.

If possible, have the voter operate the model himself, so that he will be familiar with the Machine before voting.

The attention of waiting voters also should be called to the specimen ballots, so that they will know where the different parties, candidates and questions are located on the Machine, and can find them quickly when voting.

AT GENERAL ELECTIONS

A. "Write-In" Votes

It is suggested that unless the voter asks for information about "write-in" votes, it should not be volunteered; unnecessary details may confuse him.

For additional write-in instructions, please refer to Part II, Voting, Section V, During Election, General Write-in Instructions.

§ 4D-1. Write-in campaigns.

(a) Any person or combination of two or more persons who expends $51 or more to organize, promote, or assist in any manner the write-in candidacy of any person or persons for any public office to be filled at a general election, is a political committee for the purposes of this article. The person promoted for public office under the above circumstances is a "write-in candidate."

(b) A write-in candidate is required to file a certificate of candidacy for election. The certificate shall be filed with the same agency as if the write-in candidate were filing for office under § 4A-2 of this article.

(c) The certificate of candidacy for election of a write-in candidate shall be filed no later than 7 days after a total expenditure of $51 is made in his behalf by the committee promoting his candidacy, but shall not be filed after noon on the fourth day preceding the day of the election for which filed. (1975, ch. 728, § 2.)

(h) *Write-in candidates.* — A write-in candidate, as determined under § 4D-1 of this article, is required to pay a filing fee equal to that required of a candidate for nomination to the same office sought by the write-in candidate or to the office to which he is promoted. (1957, ch. 739, § 1; 1967, ch. 392, § 1; 1969, ch. 560; 1970, ch. 103; 1971, ch. 352, § 1; chs. 354, 391; 1973, ch. 85, § 439; 1974, ch. 3; 1975, ch. 399; ch. 723, § 2; 1977, ch. 638, § 4.)

Appendix - 1D